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IN THE

Supreme Court of the United States

DENNIS ANDREWS, TIM KAUFMANN, SAUL WEINSTEIN, NOBERTO BERCASIO, FRED COFFEY, EVAN FERMAINT, RONALD PROHASKA and EDWARD BYRNE,

Petitioners,

v.

ROGER FAIRLEY and RICHARD GACKOWSKI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the appellate court correctly held that harassment of two county correctional officers, that included threats of physical violence and battery, made under color of law and with the purpose of intimidating the employees from providing truthful and constitutionally protected testimony in a civil lawsuit, is actionable under the First Amendment.

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REASONS FOR DENYING THE PETITION

Petitioners set out to silence – through harassment, threats of physical violence and batteries – Respondents' truthful testimony in a well-publicized case about the use of excessive force at the Cook County Jail. That such conduct, when done under color of law, is actionable as a violation of the First Amendment is obvious, unremarkable and does not warrant this Court's attention. Rather than cite any applicable section of Supreme Court Rule 10, Petitioners attempt to divert the Court's attention by asserting that certiorari should be granted because the Seventh Circuit Court of Appeals has "effectively transform[ed] the most basic of juvenile schoolyard threats – 'if you tell on me, I'll beat you up '– into a prima facie federal cause of action." Pet. at 7. The Court of Appeals did no such thing. Instead, the appellate opinion, citing this Court's cases from as far back as 1919, upholds the axiomatic proposition that "[t]hreatening penalties for future speech goes by the name 'prior restraint,' and a prior restraint is the quintessential first amendment violation." *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009) (citing *Schenck v. United States*, 249 U.S. 47, 51-52 (1919)("It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose.")). Not only is there no split in the Courts of Appeal on the legal issue raised in this petition, but the appellate court holding is based on well-established law and in no way "conflict[s] with relevant decisions of this Court." *See* Supreme Court Rule 10(a) & (c). The grant of a petition for certiorari requires "compelling reasons," which are entirely lacking here.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 43 S. Ct. 422, 423 (1923) (in dismissing the writ, the Court stated, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.") Accordingly, the writ must be denied.

STATEMENT OF THE CASE

Petitioners trivialize the constitutional violation here (as well as the appellate court's opinion) when they assert that the harassment in this case is akin to a playground argument among schoolchildren. Pet. at 7. The harassment in this case is substantially more serious than a typical schoolyard quarrel. As correctional officers at the Cook County Jail, Fairley and Gackowski routinely witnessed fellow officers beat and abuse inmates. R.553-6 at ¶¶46, 51, 71-72, 198, 201, 246-247, 311-312; R.686 at 4-7.[1] When they objected to and reported the abuse, their fellow officers and supervisors viciously harassed and taunted them.[2] On

1. Reference to "R." is to the number assigned by the clerk on the civil docket.

2. The record is replete with testimony about these incidents. The appellate court, relying on *Garcetti v. Ceballos*, 547 U.S. 410 (2006), held this speech is not protected by the First Amendment and that any harassment Respondents suffered as a result of that speech is not actionable. *Fairley v. Andrews*, 578 F.3d 518, 522 (7th Cir. 2009).

July 29, 2000, Fairley witnessed Petitioners Fermaint and Bercasio and other officers beat handcuffed and shackled inmates in and near the "Special Incarceration 2 Unit" (the "SI-2 Incident"). R.553-6 at ¶71, 74; R.686 at 5. Fairley yelled at the officers to stop beating the inmates. R.553-6 at ¶76; R686 at 5. Petitioner Byrne, however, told the officers, "They want to hurt my officers. Fuckin' kill 'em. They deserve to die." R.553-6 at ¶77. On August 5, 2000, Byrne told Gackowski that during the SI-2 Incident, Byrne had twisted and jumped on an inmate's leg in an attempt to break it but that he could not get it to "snap." R.553-6 at ¶89. During that same discussion, Petitioner Fermaint told Gackowksi, "[w]e got [inmate] Scott. We beat that bitch's ass." R.553-6 at ¶90.

On August 16, 2000, the inmates who had been beaten during the SI-2 Incident filed a lawsuit (the "*Fields* Litigation"). R.553-6 at ¶¶104-105; R.686 at 6. The filing of that case received substantial media attention, and was widely discussed among officers. R.553-6 at ¶¶106-124. It became widely known that an investigator working for the inmates' counsel attempted to interview Fairley, already an officer widely derided as an "inmate lover." R.686 at 7-8. After the SI-2 Incident, and increasingly after the inmates' private investigator sought to interview Fairley, both Respondents experienced pervasive and unrelenting harassment by Petitioners and other officers and supervisors. R.686 at 7-8. In addition to frequent incidents of verbal harassment, Petitioners Bercasio and Fermaint forcefully attempted to and did "dry hump" Fairley and Gackowski, seizing them from behind and simulating anal intercourse. R.553-6 at ¶¶254-256, 262;

R.686 at 8. Bercasio repeatedly drew vile pornographic cartoons of Gackowski, which were posted on bulletin boards. R.553-6 at ¶¶257-260. Petitioner Byrne repeatedly gave Fairley dangerous and undesirable assignments to the SI-2 Unit, which houses the most dangerous and violent inmates. R.553-6 at ¶¶213-214, 216-221; R.686 at 7. During these assignments, Bercasio and Fermaint repeatedly refused to unlock the security door to SI-2 to allow Fairley out to use the restroom, and provided Fairley with insufficient food and other supplies for SI-2 inmates, which provoked the inmates' rage against Fairley. R.553-6 at ¶¶251-253; R.686 at 7.

In addition to this conduct, Petitioners threatened Fairley and Gackowski with physical violence. In November 2002, Petitioner Coffey told Fairley: "You know, in the old days when we used to work here, an officer filed a complaint on another officer – or told on another officer – you'd usually get met in a parking lot." R.553-6 at ¶¶320-322. More menacing was an incident which began on December 20, 2002, when an SI-2 inmate attacked Fairley and cut him on the wrist with a shank. R.553-6 at ¶¶337, 347-349; R.668 at 10. Within a week of this attack, Bercasio told Fairley, "You see that, Fairley? You fuck with people, that's how you get stabbed." R.553-2 at ¶¶377-381. On January 7, 2003, ten days before Fairley was deposed in the *Fields* Litigation, Petitioner Prohaska approached Gackowski and asked him, "What's up with your buddy Fairley? Why is he trying to fuck us all? If Fairley goes into court on this SI-2 case from July 29, 2000 and tells the truth, he will fuck everyone involved." Gackowski asked Prohaska, "What's Fairley supposed to do? Lie for some idiots that got out of hand?" Prohaska then stated, "We always knew he

[Fairley] was a weak link and when a weak link can fuck everyone in the chain, then we have to bury the weak link. It's nothing personal. It's just business." R.553-2 at ¶384; R.686 at 11.

Following Prohaska's threat to "bury weak links,"Fairley and Gackowski went to the Internal Affairs Division ("IAD") to submit "Emergency Transfer Requests." R.553-2 at ¶¶403-405. Fairley's request stated:

> The R/O [reporting officer] on 17 Jan. 2003 gave a deposition under subpoena in a law suit [*sic*] concerning an incident that occurred on 29 July 2000 in Division One SI-2. In the R/O's sworn testimony, the R/O implicated several officers in wrongdoing one of whom was Lt. Byrne. Since this incident the R/O has been harassed and the R/O' [*sic*] life has been threatened. The harassment increased when it was known that the R/O was to give a deposition on 17 Jan. 2003. . . . The R/O requests a transfer to Chief Security and requests that Lt. Byrne be moved from that assignment.

R.553-2 at ¶¶408-409. Fairley told the Chief of IAD that there were some "bad people" working at the Cook County Jail and that he would not commit perjury for them. R.553-2 at ¶407. IAD never responded to Respondents' requests for transfers. Fearing for their safety, Fairley and Gackowski resigned their employment. R.553-2 at ¶420.

Fairley was deposed in the *Fields* Litigation on January 17, 2003, and testified about the numerous times he witnessed inmate abuse, including but not limited to the beating he witnessed during the SI-2 Incident and about Byrne's brazen encouragement of the beating. R.553-2 at ¶403; R.744-2 at ¶71; R.553-6 at ¶¶401-402; R.738 at Exhibits 8 and 9. One month later, on February 18, 2003, Gackowski was deposed in the *Fields* Litigation and testified about numerous incidences of inmate abuse that he had witnessed over the years and about Byrne's and Fermaint's admissions that they had beaten inmates during the SI-2 Incident. R.738 at Exhibit 12; R.744-2 at ¶72.

ARGUMENT

A. THERE IS NO SPLIT IN THE CIRCUITS BECAUSE THE COURT OF APPEALS' LEGAL HOLDING IS WELL-ESTABLISHED AND UNREMARKABLE.

This case does not warrant this Court's review. The essence of the panel opinion is that the "first amendment protects speakers from threats of punishment that are designed to discourage future speech." 578 F.3d at 525. There can be no legitimate dispute about this legal principle. Fairley and Gackowski are prepared to prove at trial that the Petitioners' conduct, in addition to being vile and illegal, was intended to intimidate them into silence so that they would not testify about the use of excessive force at the Cook County Jail.[3] As the

3. Petitioners repeatedly assert that their threats did not actually "prevent" Respondents from testifying in the *Fields* Litigation. *See, e.g.*, Pet. at 11. However, Respondents do not allege that Petitioners physically restrained them from getting to their depositions or the courthouse.

appellate court observed during the initial appeal in this case wherein certain of the Petitioners asserted qualified immunity: "It was clearly established long before the events of which plaintiffs complain that state actors may not assault witnesses in federal litigation. That's a crime, see 18 U.S.C. § 1512(a)(2), so no public official could think the conduct proper." *Fairley v. Fermaint*, 482 F.3d 897, 902 (7th Cir.)("*both* threats designed to deter future speech *and* penalties for past speech are forbidden") (emphasis added), *cert. denied*, 128 S. Ct. 181 (2007).

Petitioners contend that this case warrants review by the Court because it "impermissibly expands the reach of [the prior restraint] doctrine that this Court has heretofore expressly confined to state actions that rise to a 'legal impediment . . . to . . . expressive activity.'" Pet. at 7 (citations omitted). Petitioners' exaltation of form over substance is wrong as a matter of law and provides no basis for this Court to grant the writ.

Although prior restraint cases tend to arise in the context of formal "legal impediments" such as gag orders or written policies, there is no requirement for such in order to state a viable First Amendment violation. To the contrary, for well over forty-five years, this Court has recognized, for example, that "informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

In *Bantam Books*, the Court observed it was not "the first court to look through form to the substance" of the prior restraint to determine its constitutionality. *Id.* at 67 n. 8 (collecting cases). The prior restraint in

Bantam Books took the form of a notice sent by a Rhode Island state agency to book distributors indicating that the agency was listing a specific book as "objectionable." *Id.* at 62. In response, distributors often cancelled orders from publishers and pulled the book off the shelves. *Id.* Like the Petitioners here, Rhode Island took the position that there was no prior restraint because there was no actual regulation suppressing obscene material. *Id.* This Court found Rhode Island's argument untenable, and struck down the practice as unconstitutional. *Id.* at 64. Contrary to Petitioners' contention, form never has triumphed over substance for purposes of an actionable prior restraint claim. *See also Baird v. State of Arizona*, 401 U.S. 1, 5-6 (1971) (although it did not prohibit speech, Arizona violated the First Amendment when it asked about Communist party membership prior to admission to the practice of law); *Ridpath v. Board of Governors*, 447 F.3d 292, 319 (4th Cir. 2006)(where University warned employee against commenting publicly on an NCAA investigation, employee's chilling claim is essentially a "derivative of a retaliation claim: if a public employee cannot fire, demote, or similarly punish a public employee for engaging in protected speech, the employer also cannot intimidate the employee into silence by threatening impermissible retribution."); *Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999)(where a police officer's superiors threatened to terminate him if he engaged in protected speech, the court held, "a public employer is prohibited from threatening to discharge a public employee in an effort to chill that employee's rights under the First Amendment."); *Morris v. Lindau*, 196 F.3d 102, 113 (2nd Cir. 1999)(defendant's threat to discipline plaintiff employee if plaintiff spoke

out actionable as a prior restraint); *Aebisher v. Ryan*, 622 F.2d 651, 655 (2d Cir.1980) (court found cause of action existed for teacher who alleged principal's letter of reprimand in her file chilled right to speech because "First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech."); *Penthouse Internat'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1362 (5th Cir. 1980) (holding that an "informal system of prior restraint" is proscribed by the First Amendment).

With no legitimate basis to request review by the Court, the Petitioners attempt to analogize the prior restraint here (harassment and death threats and ultimate constructive discharge) to the *unenforced* provisions of the Hatch Act challenged in *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947). The *Mitchell* plaintiffs, who had neither engaged in political work nor been sanctioned under the Hatch Act, requested a declaration that certain provisions of the Act were unconstitutional. The Court found that plaintiffs failed to present a justiciable case or controversy because a "hypothetical threat is not enough."[4] *Id.* at 89-90. Respondents do not quibble with the holding of *Mitchell*, but for Petitioners to compare the harassment that Respondents endured at the hands of the Petitioners from the time the inmates' lawsuit was filed until they were constructively discharged to the "hypothetical threat" at issue in *Mitchell* is wholly unpersuasive and cannot give rise to a basis for this Court to grant certiorari in this case.

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4. During the seven years this case has been pending, Petitioners have never challenged the jurisdiction of the federal courts to hear the controversy.

The Petitioners also rely on *Alexander v. United States*, 509 U.S. 544 (1993), to attempt to persuade this Court that the appellate court overstepped its authority by holding that the harassment at issue here could constitute an actionable prior restraint. The Petitioner in *Alexander* argued that a RICO-based forfeiture of assets "operates as a prior restraint because it prohibits future presumptively protected expression in retaliation for prior unprotected speech." *Id.* at 549-550. The Court refused to "stretch the term 'prior restraint'" in this context where the forfeiture order did not forbid speech, but, based on a criminal conviction, seized assets from the convict. *Id.* Unlike the wholly inapposite forfeiture order in *Alexander*, Fairley and Gackowski stand ready to prove that the threats and harassment in this case were intended to deter their future constitutionally protected speech. Though Petitioners may argue to the jury that the harassment did not take place or that it was not intended to deter Respondents' speech, those issues are of no concern to this Court. It is well-past time for Respondents to have an opportunity to prove their case to a jury. Certiorari should be denied.

CONCLUSION

The holding in this case, while significant to both the Petitioners and the Respondents, falls far short of presenting any compelling reason for this Court's review. Respondents respectfully request this Court to deny the petition for certiorari.

Respectfully submitted,

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